Circuit Court for Prince George's County
Case No. CT 18-0679A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1763

September Term, 2019

TERRANCE ANTIONE STOUTAMIRE

v.

STATE OF MARYLAND

Kehoe,
Gould,
Eyler, Deborah S,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: October 23, 2020

After a jury trial in the Circuit Court for Prince George's County, Terrance Antione Stoutamire was convicted of armed robbery, robbery, first-degree assault, use of a firearm in a crime of violence, and conspiracy to commit armed robbery. He has appealed and presents three contentions, which we have slightly reworded:

1. Did the circuit court err in refusing to voir dire potential jurors as to whether they were unwilling or unable to comply with instructions on the presumption of innocence, the burden of proof, and the appellant's right not to testify and by generally failing to propound adequate voir dire to uncover biases that may have given rise to meritorious motions to strike or grounds for disqualification of a prospective juror?

2. Did the circuit court err in denying appellant's motion to suppress identification evidence after finding that the identification of the appellant had been unnecessarily suggestive?

3. Did the trial court err by refusing to give the customized identification instruction which accurately informed and educated the jury on how to evaluate the eyewitness identification testimony it had received?

We will reverse the convictions and remand the case to the circuit court for a new trial.

Background

We will focus our discussion of the facts on those that are relevant to the parties' contentions. *Cf. Kennedy v. State*, 436 Md. 686, 688 (2014).

Duong Nguyen was in the business of selling used mobile telephones and related peripheral devices. One of his regular suppliers was a man he knew only as "Mike." Their business relationship appears to have been conducted on a cash-on-delivery basis. Sometimes Nguyen dealt directly with Mike, but on other occasions an unnamed individual, thought by Nguyen to be Mike's brother, acted as an intermediary.

In March 2018, Nguyen arranged to purchase $16,000 worth of cell phones from Mike. The two arranged to meet one another during the day in the parking lot of a restaurant in College Park on the afternoon of March 28. When Nguyen reached the parking lot at the appointed time, he notified Mike, but Mike did not appear. Instead, another man, whose identity was unknown to Nguyen, approached his car. The unknown man got into Nguyen's car, sat in the passenger seat next to him and proceeded to rob him at gunpoint.

It was the State's theory at trial that "Mike" was Demetri Stoutamire, that the man who robbed Nguyen was appellant, who is Demetri Stoutamire's cousin, and that the two men were in cahoots with one another in planning and executing the robbery.

Analysis

1. Voir dire

Prior to the beginning of voir dire, appellant's trial counsel requested that the trial court ask a number of questions to the potential jurors including:

> Does any member of the jury panel have any disagreement with or would have any difficulty applying or understanding the constitutional rights which a jury must apply throughout a trial and during its deliberations such as:
>
> a. the accused is presumed innocent until proven guilty;
>
> b. the State must produce evidence and has the burden of proof throughout the trial;
>
> c. the accused has no burden of proof and need not say anything nor produce any evidence; [and]
>
> d. the accused need not testify and the jury may not even consider that as evidence against him. . . .

The trial court declined to ask these questions. Appellant timely objected to the court's ruling and, after the jury was selected, renewed his objection.

As the State concedes, reversal of the convictions is required in light of one of the Court's holdings in *Kazadi v. State*, 467 Md. 1, 9 (2020) ("[W]e overrule the holding in *Twining* [*v. State*, 234 Md. 97, 100 (1964)], and conclude that, on request, during voir dire, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the fundamental principles of presumption of innocence, the State's burden of proof, and the defendant's right not to testify."). Additionally, the Court explained that "consistent with this Court's case law . . . our holding applies to this case and any other cases that are pending on direct appeal when this opinion is filed, where the relevant question has been preserved for appellate review." 467 Md. at 47; *see also Foster v. State*, ___ Md. App. ___, No. 462, Sept. Term, 2019, slip op. at 3–4 (Filed Sept. 30, 2020).

2. The motion to suppress

Appellant filed a pre-trial motion to suppress Nguyen's identification of appellant as the robber. He asserted that the means by which the police elicited that identification was impermissibly suggestive.

Analyzing a defendant's challenge to an out-of-court identification entails two steps. First, the defendant must prove the procedures used by police to obtain the identification were "impermissibly suggestive." *Jones v. State*, 395 Md. 97, 110 (2006); *Morales v. State*,

219 Md. App. 1, 13 (2014). If the suppression court's answer to this question is no, the court's "inquiry ends" and evidence of the identification is admissible at trial. *Small v. State*, 464 Md. 68, 89 (2019). But if the suppression court's answer is yes, then the burden shifts to the prosecution to prove by clear and convincing evidence that the identification is nevertheless reliable. The State satisfies this burden by showing that "the independent reliability in the identification outweighs the corrupting effect of the suggestive procedure." *Wood v. State*, 196 Md. App. 146, 161 (2010) (quoting *Gatewood v. State*, 158 Md. App. 458, 475 (2004)).

At the suppression hearing, the detective investigating the robbery testified that, in his initial interview with the victim, Nguyen told him that the robber was neither Mike nor Mike's brother. Nguyen also gave him Mike's mobile phone number. The detective obtained phone records for the cell phone number associated with "Mike," and learned that the customer of that number was Demetri Stoutamire. He presented Nguyen with a picture of Demetri Stoutamire for the purpose of confirming that "Mike" and Demetri were one and the same person. Nguyen confirmed this. We now come to the part of the identification process that appellant says is constitutionally defective.

The records for Demetri's cell phone showed that another telephone had called Demetri's telephone both before and after the robbery. The detective tracked this other phone number down to appellant. Because appellant and Demetri Stoutamire shared the last surname, the detective thought that appellant was Mike's brother. The detective sent

Nguyen a photograph of appellant which included his name[1] and asked Nguyen if the person in the photo was "Mike's" brother. At the suppression hearing, the detective testified that, at the time he sent appellant's picture to Nguyen, he did not suspect that appellant had been involved in the robbery. Instead, said the detective, he wanted to learn if the person shown in the picture was either Mike's brother or if he could otherwise use the photograph "to try to develop the second suspect." In response, Nguyen texted that the person in the photo did not look like Mike's brother but did resemble the person who robbed him, although he "was not 100% sure." Nguyen asked the detective for another photo, which the detective provided but Nguyen was still unsure as to whether the person in the photograph was the person who robbed him.

Several hours later, Nguyen contacted the detective. Nguyen related that he had searched the name "Stoutamire" in Facebook, had come upon additional photos of appellant, and recognized him as the person who robbed him. Nguyen was sure that his identification was correct—he told the detective that he "was shaking when I saw the pictures" of appellant on Facebook.

The State's other witness at the hearing was Nguyen. In pertinent part, he testified that he did not have trouble seeing and that he did not wear glasses. The robbery took place in mid-afternoon. The robber was wearing a sweatshirt with a hood. Although the hood was

[1] The detective said that including appellant's name was inadvertent.

pulled up onto the robber's head, his face was clearly visible to Nguyen, and he watched the robber and saw his face as he approached the front passenger side of Nguyen's car. Nguyen testified that he saw the robber's face again as the latter opened the door and sat in the front passenger seat. After the robber sat down, he reached into his backpack "so I was keeping [sic] looking at him, . . . so I was watching him. I think I was watching him the whole time." During this time the robber was sitting about two feet away from Nguyen. After the robber pulled a gun from his backpack, he and Nguyen made eye contact. Nguyen testified that the whole incident lasted "at least one minute, but I'm not exactly sure how long the event occurred." Finally, Nguyen admitted that, when the robber pointed the handgun at him, he "lost focus," or faded for a few seconds."

After the hearing, the suppression court stated that it

> candidly [did] not believe [that the detective] thought that Mike's brother was not a suspect in this case [when the detective first sent pictures of appellant to Nguyen.] Perhaps you could have argued that he was a person of interest, but at the time that he is looking at and texting Mr. Nguyen on April 5th he has already said that he was looking at cell phone records from Verizon and seeing and matching up numbers to different things.
>
> • • •
>
> And I simply at that point, at this point, I think it's highly suspect, and I simply do not believe him that he wasn't a suspect. Everybody on those phone numbers were suspects at that point.

The suppression court concluded that the procedure employed by the detective was impermissibly suggestive. The court then considered whether the prosecution had produced clear and convincing evidence that Nguyen's identification of appellant was nonetheless sufficiently reliable to submit it to the jury. The court concluded that the State

had done so. The court placed particular weight on the fact that Nguyen "testified very distinctly that the person he has identified as doing this crime was within two feet of him, seated next to him in a — what I would call a small car."

Neither party is happy with this result. For its part, the State argues that the suppression court erred as a matter of law in concluding that the chain of events that eventually resulted in Nguyen's discovering appellant's photographs on Facebook was impermissibly suggestive. However, says the State, the suppression court did not err when it found that Nguyen's identification of appellant was independently reliable. Appellant's contentions are the mirror image: he argues that the suppression court correctly concluded that the selection process was impermissibly suggestive but erred when it found that the prosecution had proven by clear and convincing evidence that Nguyen's identification of appellant was nonetheless reliable.

We agree with appellant as to the first issue. We will not interfere with the suppression court's credibility-based assessment of the actual, as opposed to the purported, reasons why the detective sent appellant's photograph to Nguyen. It is true that the detective did not explicitly ask Nguyen whether the man in the photograph was the person who had robbed him. But in this context, there is little difference between explicit and implicit suggestions. As Judge Moylan recently explained for this Court:

> [T]he very purpose of constitutional identification law has been to guarantee the reliability of the selection process. Whenever a witness is asked to select the wrongdoer from a line-up of suspects, to select a photograph of the wrongdoer from a photographic array, or otherwise to select the wrongdoer

> from a larger group, the law's concern is that the selection process be untainted by *the police slipping the answer, by word or by more subtle behavior*, to the witness.

State v. Green, 240 Md. App. 119, 124 (2019) (emphasis added).

This brings us to the second part of our analysis. Nearly fifty years ago, the Supreme Court explained that "it is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence[.]" *Neil v. Biggers*, 409 U.S. 188, 199 (1972). For this reason, "if the identification procedure was tainted by suggestiveness, then evidence of the identification is not per se excluded. *Small*, 464 Md. at 83 (citing *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012). ("An identification infected by improper police influence, our case law holds, is not automatically excluded.").

There are five factors that "may be used to assess [the] reliability [of an identification:] the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's description of the criminal, the witness's level of certainty in his or her identification, and the length of time between the crime and the identification." *Small*, 464 Md. at 84 (citing, among other authorities, *Neil v. Biggers*, 409 U.S. at 199-200). The suppression court's task is to "determine whether the identification is admissible by weighing the reliability of the identification against the 'corrupting effect' of the suggestiveness." *Small*, 464 Md. 84. The State bears the burden of demonstrating reliability by clear and convincing evidence. *Id.* An appellate court reviews the suppression

court's findings of fact for clear error in the light most favorable to the State as the prevailing party. *Id.* at 88. We exercise *de novo* review over the suppression court's legal findings and "independently apply the law to the facts to determine whether a defendant's constitutional rights have been violated." *Id.*

When viewed in the light most favorable to the State as the prevailing party, the evidence in the suppression hearing indicated Nguyen met with the robber during the day, and that they sat together in Nguyen's car (Nguyen in the driver's seat and the robber in the passenger's seat). Nguyen observed the robber as he approached his car, as he entered his car and, for at least a minute, while the robber sat next to him. The court found that Nguyen "definitely had the opportunity to view" the robber and Nguyen testified that he did so. The court further found that Nguyen was focused on the robber's face, even though he understandably became distracted when a gun was pointed at him. The court found that Nguyen's earlier description of the robber was somewhat at variance with appellant's appearance, a factor which in the court's mind, weighed "a little bit in favor of the [appellant]." The court noted that there was no formal line-up or show-up procedure in this case. Finally, the court found that the robbery took place on March 28 and Nguyen's identification occurred on April 5th or 6th, which the court characterized as "not a significant length of time[.]" From this, the court concluded reliability of the identification had been demonstrated by clear and convincing evidence.

It is clear that the factor that weighed most heavily in the suppression court's analysis was that Nguyen and the robber were within a few feet of one another in Nguyen's car in in broad daylight when the robbery occurred. "Clear and convincing evidence" means that the evidence "must be more than a mere preponderance but not beyond a reasonable doubt." *Attorney Grievance Comm'n of Maryland v. Smith*, 376 Md. 202, 229 (2003). Another definition is that "[t]o be clear and convincing, evidence should be 'clear' in the sense that it is certain, plain to the understanding, and unambiguous and 'convincing' in the sense that it is so reasonable and persuasive as to cause one to believe it." *Mathis v. Hargrove*, 166 Md. App. 286, 312 (2005).

We bear in mind that the issue at this point in the suppression hearing was not whether Nguyen's identification of appellant as the person who robbed him was correct, but rather when his identification of appellant was sufficiently reliable for the jury to decide whether it was correct. *Perry*, 565 U.S. at 232 ("Where, however, "the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth."); *see also Small*, 464 Md. at 93 (same).

This is an unusual case because Nguyen did not identify appellant as the robber based on the photographs provided to him by the police. Rather, in light of the two photographs, he conducted his own investigation on Facebook and found other images of appellant. Nguyen had an ample opportunity to observe the robber in broad daylight and at close

range. After an independent review of the evidence, we conclude, as did the suppression court, that were "sufficient indicia of reliability," *Small*, 464 Md. at 103, to permit evidence of his identification to be admitted into evidence at trial.[2]

3.

The final issue raised by appellant pertains to jury instructions regarding the reliability of eyewitness identifications by the victim of a crime. This is a matter that is best addressed by the parties and the court on remand, especially so because the Maryland legal landscape on this issue may be dynamic. *See Small*, 464 Md. at 117 (Barbera, C. J., concurring) ("I suggest that this Court ask the Criminal Subcommittee of the Standing Committee on Maryland Pattern Jury Instructions to create a pattern jury instruction for use in the appropriate case, to better guide jurors" on evaluating eyewitness identification testimony.)

[2] The prosecution presented additional arguments at the suppression hearing. The State asserts one of them on appeal. In summary, the State argues that the motion to suppress was correctly denied because appellant "failed to demonstrate that the identification was the product of an impermissibly suggestive identification procedure by police during a selective identification process." To us, the State points out that Nguyen had advised the detective that "Mike" was not the robber before the detective sent him appellant's photo. The State asserts that "[i]t would defy logic to conclude that, in attempting to confirm whether Terrance Stoutamire was 'Mike's brother,' [the detective] thereby 'suggested' that Terrance Stoutamire *was* the robber." (Emphasis in original).

The problem with this argument from our perspective is that the suppression court did not credit the detective's testimony that appellant was not a suspect when his photograph was sent to Nguyen. With that as a starting premise, we think it is reasonable to conclude, as did the suppression court, that, in purporting to clarify Mike's brother's identity, the detective was also presenting appellant to Nguyen as a possible suspect.

THE JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY ARE REVERSED AND THIS CASE IS REMANDED TO IT FOR A NEW TRIAL. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.